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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM M. RADIGAN - - - - Petitioner

vs.

SUPREME COURT OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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March 21, 1984

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QUESTIONS PRESENTED

I.

Whether the Court below denied petitioner due process of law under the Fourteenth Amendment to the Federal Constitution by failing to observe minimal presumptions of law as well as standards and burdens of proof in adjudicating petitioner in contempt of court.

II.

Whether the Court below denied petitioner his right to Federal due process of law by failing to provide clear and certain notice that petitioner was facing criminal contempt charges.

III.

Whether the Court below denied petitioner Federal procedural due process by finding him guilty of criminal contempt without affording him an opportunity to present or cross-examine witnesses and by acting in disregard of his Fifth Amendment privilege against self-incrimination.

IV.

Whether the Court below denied petitioner due process of law under the Federal constitution by holding him in contempt of Court when his conduct constituted both "substantial compliance" and a "good faith effort to comply" with the October 3, 1983 Order.

V.

Whether the Court below denied petitioner Federal due process of law by holding him in contempt of Court when the evidence revealed that petitioner lacked the present ability to comply with the October 11, 1983 deadline for filing the Appellant's Brief.

VI.

Whether the Court below denied petitioner Federal due process by finding him in contempt of court where there was no competent, probative evidence to support a finding of criminal contempt.

VII.

Whether the decision of the Court below to hold petitioner in contempt of Court, under the facts and circumstances at bar, was arbitrary and capricious and an abuse of due process of law under the Federal Constitution.

VIII.

Whether the Court below, in failing to recuse itself from the contempt proceedings in the above-captioned case, denied petitioner his constitutional right to a fair trial.

IX.

Whether the Court below denied petitioner Federal due process of law by suspending the imposition of his fine without setting any time limitation on the suspension and without delineating any terms and conditions for the suspension.

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v.

SUPREME COURT OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, William M. Radigan, prays that a writ of certiorari issue to review the opinion and order of the Supreme Court of Kentucky entered in this proceeding on November 2, 1983.

OPINIONS BELOW

The opinion and order finding the petitioner, William M. Radigan, in contempt of court and fining him $100 for his contempt, payment of the fine suspended to further conduct, was rendered by the Kentucky Supreme Court on November 2, 1983. That opinion and order is reported as *In Re Radigan,* Ky., 660 S. W. 2d 673 (1983). The Kentucky Supreme Court denied petitioner's motion to vacate on November 17, 1983 in an unpublished order. The Kentucky Supreme Court denied petitioner's motion to reconsider on December 22, 1983 in an unpublished order. Copies

of the above-mentioned opinion and orders are attached hereto.

JURISDICTION

The opinion and order of the Kentucky Supreme Court was entered on November 2, 1983. Petitioner's timely motion to reconsider was denied on December 22, 1983. An order extending the time to file the petition for writ of certiorari in the above-captioned cause to and including March 21, 1984 was entered by this Court on February 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution.

The Fifth Amendment to the United States Constitution, in pertinent part:

> . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent parts:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel.

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law . . .

STATEMENT OF THE CASE

On October 3, 1983, the Kentucky Supreme Court entered an order granting the indigent appellant in the case of *Joseph Herald* v. *Commonwealth of Kentucky,* Kentucky Supreme Court No. 83-SC-522-I, an extension of time to and including October 11, 1983 to file the initial appellant's brief and perfect the criminal appeal. The order of October 3, 1983 also directed that, "[i]f appellant's brief is not filed on or before October 11, 1983, counsel for the appellant [William M. Radigan, court-appointed appellate public defender] shall appear before this court on October 24, 1983, at 10:30 a.m., in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief" (Order, 10-3-83).

On October 11, 1983, Mr. Radigan[1] filed a motion for an extension of ten days in which to file the *Herald* brief. Prior to the Kentucky Supreme Court's ruling

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[1]At all times during his representation on appeal of Joseph Herald, the petitioner, William M. Radigan, was employed by the Kentucky Department of Public Advocacy, "an independent agency of state government," created "to provide for the establishment, maintenance and operation of a state sponsored and controlled system for," *inter alia*, "[t]he representation of indigent persons accused of crimes . . . which may result in their incar-

(Footnote continued on following page)

on this *timely* extension request of October 11, 1983, Mr. Radigan on October 21, 1983 tendered for filing the appellant's brief in the *Herald* case. Consequently, when Mr. Radigan appeared before the Kentucky Supreme Court on October 26, 1983 for the rescheduled show cause hearing, he had already tendered for filing as of October 21, 1983 the brief for appellant in the *Herald* case. On October 31, 1983, the Kentucky Supreme Court granted Mr. Radigan's motion for a ten-day extension and ordered the appellant's brief in the *Herald* case filed as of that date (Order, 10-31-83). Consequently, five days after the show cause hearing and three days prior to the issuance of the opinion and order holding Mr. Radigan in contempt, the Kentucky Supreme Court by order directed that the tendered appellant's brief in *Herald* be filed.

At the show cause hearing held in the instant case, the Chief Justice of the Kentucky Supreme Court commenced the hearing by stating:

> Mr. Radigan will attempt to explain — to show cause why he should not be punished for contempt for not filing an order of this Court — or complying with an order of this Court vis a vis the filing of a brief on a certain time (Tape of Hearing, hereinafter designated T.H.).

(Footnote continued from preceding page)

ceration . . . " KRS [Kentucky Revised Statutes] 31.010(1). Mr. Radigan was employed as an "assistant public advocate." According to Kentucky law, "[t]he assistant public advocates shall be attorneys, shall be appointed by the public advocate, and shall be covered by the merit system." KRS 31.020(4).

The Chief Justice then remarked, "I have talked to the Court and certainly Mr. Radigan you can go ahead and make whatever explanation you want. I have also, with the permission of the Court, Mr. [Paul] Isaacs [the Kentucky Public Advocate], let you say something, a very limited amount. Now I think Mr. Radigan should take the stand, as it were" (T.H.).

At that point Mr. Radigan told the Kentucky Supreme Court, "I think that I can explain the situation in one very simple word — caseload" (T.H.). Mr. Radigan then began to explain the caseload problems on appeal beseiging both the Department of Public Advocacy's appellate section and the individual appellate attorneys in that section.

Almost immediately Mr. Radigan, the petitioner, was interrupted by one of the court members, Justice Vance, who asked, "Is it true then from your talking about the caseload that if it had not been for the caseload you could have complied with this order to get the brief in on time" (T.H.)? Petitioner responded by explaining that at the time the show cause order at bar was entered, he was under a similar order from the Kentucky Court of Appeals, the intermediate appellate court of Kentucky, to file in that court a brief on which he had already started working (T.H.) Petitioner explained he was "attempting to get that brief finished at the same time when [the Kentucky Supreme Court's] order came out" and "[i]t was simply physically impossible for [him], timewise, to get any type of preparation done on this brief to comply with [the Supreme Court's] order" (T.H.).

Mr. Radigan then told the Kenutcky Supreme Court that since July 5, 1983, the date he received the *Herald* case, he had filed a total of fourteen (14) appellate briefs in the Kentucky Supreme Court and the Kentucky Court of Appeals as well as "several briefs in the federal district court" and one in the federal court of appeals (T.H.).

Petitioner explained that he completed the brief in the *Herald* case within ten days after he began reading the record (T.H.).

Justice Leibson then told Mr. Radigan that he found it "extremely unacceptable," "completely unacceptable," "this business of filing for an extension on the last day when the brief is due" (T.H.).

Mr. Isaacs, the Public Advocate, petitioner's ultimate administrative supervisor, then spoke briefly at the hearing, but explained that he would make no statements "concerning this particular case" for various reasons (T.H.). Mr. Isaacs only discussed his general commitment to try to solve the problems mentioned at the hearing (T.H.).

No other persons besides petitioner and Mr. Isaacs addressed the Kentucky Supreme Court at the hearing.

On November 2, 1983, in a published opinion and order, the Kentucky Supreme Court observed that a show cause "hearing was held on October 26, 1983, at which time Mr. Radigan appeared and offered explanation" for his failure to comply with the order of October 3, 1983. *In Re Radigan,* Ky., 660 S. W. 2d 673 (1983). The Kentucky Supreme Court in its opinion and order made numerous findings of fact. "The tran-

script of evidence was filed on June 10, 1983." *Id.* "Thereafter on three occasions on or about the day the brief was due the appellant failed to file but instead filed an affidavit, notice and motion for another thirty days extension." *Id.* "In each case the allegations of Mr. Radigan's affidavits are markedly similar." *Id.* After noting that "for the most part the six paragraphs of allegations in each affidavit parrot the preceding affidavit chapter and verse except for small differences in the first paragraph," the Kentucky Supreme Court concluded that "[i] sum they indicate counsel is reasonably busy, and nothing further." *Id.*

According to the Kentucky Supreme Court, "[a]t the oral hearing conducted on October 26, 1983, Mr. Radigan advised [the court] that he looked at the record for the first time on the last day of the third extension." *Id.* The Supreme Court of Kentucky emphasized that "[i]n spite of a pending show cause order he [petitioner] intentionally chose to work on other matters." *Id.*

The Kentucky Supreme Court observed that "[w]hen Mr. Radigan appeared in response to the Order of [the Kentucky Supreme Court] to show cause, his response was significantly inadequate." *Id.* at 674. The Kentucky Court found that "[t]he brief which [petitioner] has filed in the Joseph Herald case shows that it is a relatively simple case with few issues, all of a routine nature," which as petitioner "has admitted and demonstrated," is "a brief that should have taken ten days to prepare, filed 133 days after the transcript of evidence was filed." *Id.*

The Kentucky Supreme Court found "no acceptable excuse for beginning work on this case on October 11, 1983" and further found petitioner "in contempt of the Order . . . entered October 3, 1983, requiring him to file his brief on or before October 11, 1983 or appear to show cause why he should not be held in contempt for failure to do." *Id.* According to the Kentucky Supreme Court, petitioner's "explanations as to other work and projects occupying his time during the period in question" are "grossly inadequate." *Id.* The Kentucky Supreme Court found "no explanation for failing to notify [it] immediately if there were considerations that would legitimately have prevented [petitioner's] complying with" the October 3, 1983 Order. *Id.*

The Kentucky Supreme Court found petitioner in contempt of court and fined him $100 for his contempt. Because "this" was petitioner's "first conviction, payment of the fine [was] suspended subject to [petitioner's] further conduct." *Id.*

In his motion to vacate the opinion and order of the Kentucky Supreme Court rendered on November 2, 1983 as being obtained in violation of appellate due process under the Fourteenth Amendment of the United States Constitution, the petitioner argued that the decision in his case was rendered by a five justice court composed of three mandatorily disqualified justices and that the appellate tribunal was constituted in violation of §110(3) of the Kentucky Constitution. On November 17, 1983, the Kentucky Supreme Court

entered an order summarily denying petitioner's motion to vacate.

In his timely motion to reconsider the order holding him in contempt of court the petitioner asserted the following federal constitutional contentions that: (a) he was denied due process of law by the failure of the Kentucky Supreme Court to observe minimal presumptions of law as well as standards and burdens of proof in adjudicating him in contempt of court; (b) he was denied his right to due process of law by the Kentucky Supreme Court's failure to provide clear and certain notice that he was facing criminal contempt charges; (c) he was denied procedural due process by the Kentucky Supreme Court finding him guilty of criminal contempt without affording him an opportunity to present or cross-examine witnesses and by the court acting in disregard of his Fifth Amendment privilege against self-incrimination; (d) he was denied due process of law by the Kentucky Supreme Court holding him in contempt of court when his conduct constituted both "substantial compliance" and a "good faith effort to comply" with the court's order of October 3, 1983; (e) he was denied due process of law by the Kentucky Supreme Court holding him in contempt when the evidence revealed that he lacked the present ability to comply with the October 11, 1983 deadline for filing the appellant's brief in the *Herald* case; (f) he was denied federal due process by the Kentucky Supreme Court finding him in contempt where there was no competent, probative evidence to support a finding of criminal contempt; (g) he was denied due process

by the Kentucky Supreme Court's arbitrary and capracious finding, under the facts and circumstances at bar, that he was in contempt of court; (h) he was denied due process when the Kentucky Supreme Court violated the rule of the least judicial power and held him in contempt, even after he had by timely motion requested an extension to file the brief and tendered the brief within the requested period; (i) he was denied his constitutional right to a fair trial when the Kentucky Supreme Court failed to recuse itself from the contempt proceedings at bar; (j) he was denied due process by the Kentucky Supreme Court's judicial vindictiveness in holding him in contempt of court for requesting an extension of ten days past the court imposed deadline of October 11, 1983; and (k) he was denied due process by the Kentucky Supreme Court's suspension of the imposition of his fine without setting any time limitation on the suspension and without delineating any terms and conditions for the suspension. These were the federal constitutional contentions that the Supreme Court of Kentucky summarily overruled by denying petitioner's timely motion to reconsider the opinion and order holding him in contempt of court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Holding Petitioner In Contempt Of Court, Without Affording Him the Procedural Due Process Mandated by the Federal Constitution, Conflicts with Previous Decisions of the Court.

It is quite apparent from the wording of the order of October 3, 1983 that the purpose of including the

requirement of a "show cause" hearing was to "compel obediance to and respect for an order of court." *See Young* v. *Knight,* Ky., 329 S. W. 2d 195, 200 (1959). Thus, the Kentucky Supreme Court communicated to William M. Radigan only that it would seek to punish him by holding him in contempt if he did not "timely file" the appellant's brief in the *Herald* case. Such an order put petitioner on notice that he faced a show cause hearing limited to the question of civil, not criminal contempt. *Young* v. *Knight, supra; Hardin* v. *Summit,* Ky., 627 S. W. 2d 580, 582 (1982).

The opinion and order of November 2, 1983 is totally devoid of any language which indicates that the court below gave Mr. Radigan the benefit of any legal presumptions—such as the presumption of innocence or the presumption of compliance—or placed the burden of proof on the Kentucky court rather than on the alleged contemnor, Mr. Radigan. Finally, it is clear from a persual of the opinion and order in question that the court below did not assess the proof by an accepted, articulated standard of proof such as "proof beyond a reasonable doubt" or proof by "clear and convincing evidence."

In the instant case, the court's order of October 3, 1983 appeared to be drafted in terms of civil contempt, but the sanction of a $100 fine imposed *after* the appellant's brief in the *Herald* case had been tendered by Mr. Radigan clearly made the entire proceeding one of criminal contempt.

"It is not the fact of punishment but rather its character and purpose that often serve to distinguish

civil from criminal contempt." *Shillitani* v. *United States,* 384 U. S. 364, 86 S. Ct. 1531, 1535, 16 L. Ed. 2d 622 (1966), citing *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911). *See Hardin* v. *Summitt, supra* at 581.

In civil contempt, "the act of disobedience consist[s] solely 'in refusing to do what had been ordered, . . . not 'in doing what had been prohibited.'" *Shillitani* v. *United States, supra,* 86 S. Ct. at 1534. When the contemnor carries "the keys of his prison in his own pocket," the action "is essentially a civil remedy designed for the benefit of other parties and . . . to secure compliance with judicial decrees." *Id.*

To open the show cause hearing, Chief Justice Stephens announced that now "Mr.Radigan will attempt to explain . . . why he should not be punished for contempt for not . . . complying with an order of this Court vis a vis the filing of a brief on a certain time" (T.H.).

In its opinion of November 2, 1983, the court below stated that "[w]hen Mr. Radigan appeared in response to the Order of the Court to show cause, his response was significantly inadequate". *Id.,* at 674.

Obviously, the Kentucky court used the mere issuance of a "show cause" order, one promulgated in advance of any conduct which could be deemed a violation of any order, to denigrate Mr. Radigan's presumptions of either "innocence" or "compliance" and to shift the burden of proof from the court or its representative to Mr. Radigan. Such an approach, even by

the highest court of a State, is violative of the United States Constitution.

A review of the entire opinion and order under scrutiny reveals that the Kentucky Supreme Court at no time enunciated a standard of proof, such as "proof beyond a reasonable doubt" or "clear and convincing evidence," by which Mr. Radigan's conduct was found to be contumacious. Instead, the phrases employed to indicate the standard of proof employed in this decision are "significantly inadequate," "no acceptable excuse," and "grossly inadequate". *Id.*, at 674.

By depriving Mr. Radigan of these various federal constitutional protections, the Supreme Court of Kentucky effectively skewed the fact-finding process and undermined the correctness of its legal and factual determination. *Addington* v. *Texas,* 441 U. S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *In re Winship,* 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Speaking within the context of a contempt proceeding, this Court in *In Re Oliver,* 333 U. S. 257, 68 S. Ct. 499, 507-08, 92 L. Ed. 682 (1948), held that due process of law requires clear and certain notice of the charge:

> A person's right to *reasonable notice of a charge against him,* and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . (emphasis added).

Only a show cause order issued by the court is able to provide reasonable notice of the charge necessary

for due process. "Reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed is basic to our system of jurisprudence." *Groppi* v. *Leslie,* 404 U. S. 496, 92 S. Ct. 582, 586, 30 L. Ed. 2d 632 (1972).

The show cause order of October 3, 1983 only gave notice of a possible *civil* contempt action. The obvious purpose and intent of the order of October 3, 1983 was to insure that a brief was promptly filed in the *Herald* case. When Mr. Radigan tendered that brief on October 21, 1983—five (5) days before the show cause hearing—he purged himself of that contempt. However, it is clear from the opinion and order of November 2, 1983 that Mr. Radigan was found guilty of *criminal* contempt. As the court below characterized it, Mr. Radigan's contempt was his "first conviction". *Id.,* at 674.

Without doubt, the nature of a criminal contempt proceeding is entirely different than civil contempt. No longer is there an attempt to compel action by the person; instead the individual is being punished for past offensive conduct. The only possible means for the court below to have altered the civil contempt action to criminal contempt was for a new show cause order to be issued specifying the possible action for which Radigan was to be punished.

The failure of the Supreme Court of Kentucky to give Mr. Radigan notice of the type of contempt he was facing constitutes a violation of due process of law. As this Court stated in *Gompers* v. *Buck's Stove &*

Range Co., 221 U. S. 418, 31 S. Ct. 492, 500, 55 L. Ed. 797 (1911):

> [E]very citizen . . . by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it was sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, *but to know that it is a charge, and not a suit* (emphasis added).

It is a fundamental precept that a civil contempt proceeding cannot be changed to criminal contempt without notice. In *Gompers*, this Court examined a situation where a company had filed a show cause motion against the leaders of a union for violating a previously issued injunction. *Id.*, 31 S. Ct. at 496. Following a show cause hearing, the judge imposed sentences of imprisonment on each defendant. *Id.*, 31 S. Ct. at 497-98. This Court, in determining that a criminal contempt punishment had been imposed in a case involving civil contempt, reversed the judgment and commented:

> There was therefore a departure — a variance — between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief in the equity cause, the court imposed a punitative sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in

> an action of "A vs. B, for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months. *Id.*

Similarly, Mr. Radigan should not have been punished for criminal contempt where the proceedings were for civil contempt.

From the tape of the show cause hearing, it is apparent that the court below was concerned about the fact that Mr. Radigan filed another extension motion on the day the brief was scheduled to be filed. This was likewise reflected in the opinion and order of November 2, 1983. In the paragraph detailing the reasons for the contempt citation, the court below stated:

> We find no explanation for failing to notify us immediately if there were considerations that would have legitimately prevented his complying with our Order of October 3 when notified thereof. *Id.*, at 674.

Obviously, a portion of the contempt holding was premised on Mr. Radigan not immediately filing an additional extension motion.

However, as noted in the show cause order, Mr. Radigan was informed that contempt was possible only if the brief was not timely filed. There was not an iota of notice that petitioner could be held in contempt for not immediately filing an extension motion. Such "a conviction upon a charge not made" is a denial of "constitutional due process." *Eaton* v. *Tulsa*, 415 U. S. 697, 94 S. Ct. 1228, 1229, 39 L. Ed. 2d 693 (1974).

As the prior discussion reveals, the notice provided by the October 3, 1983 order was, at best, vague and ambiguous. Such vagueness, however, is fatal to the ultimate finding that Mr. Radigan was in criminal contempt of the court below.

"The judicial contempt power is a potent weapon." *Internat'l Long. Assn.* v. *Philadelphia Mar. T. A.*, 389 U. S. 64, 88 S. Ct. 201, 208, 19 L. Ed. 2d 236 (1967). "When it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.*, 88 S. Ct. at 208. This Court there differentiated between "a violation of a court order by one who full understands its meaning but chooses to ignore its mandate" and "acts alleged to violate a decree that can only be described as unintelligible." *Id.*

"The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Id.*, 88 S. Ct. at 208.

The procedural due process rights which attach to a contempt proceeding "include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In Re Oliver*, 333 U. S. 257, 68 S. Ct., 499, 507-08, 92 L. Ed. 2d 682 (1948). The only exception to this rule is where the act of misconduct occurs "in open court, in the presence of the judge." *Id.*, 68 S. Ct. at 509. *Taylor* v. *Hayes*, 413 U. S. 488, 94 S. Ct. 2697, 2702-2703, 41 L. E. 2d 897 (1974). Additionally, it has been long recognized that the Fifth Amendment privilege against self-incrimination applies to contempt hearings. *Gom-*

pers v. *Buck's Stove & Range Company*, 221 U. S. 418, 31 S. Ct. 492, 500, 55 L. Ed. 797 (1911).

The court below at the show cause hearing failed to comply with these minimal due process standards. Rather than acting under the presumption that Mr. Radigan had complied with the order of October 3, 1983, the court acted on the presumption that Mr. Radigan was in comtempt. The burden of proof was shifted to Mr. Radigan to *disprove* the contempt. Even though the court below made three pragraphs of "findings of facts" in its opinion and order, there were no witnesses presented on October 26, 1983 for Mr. Radigan to cross-examine.

Without any notice as to the criminal nature of the October 26th hearing, Mr. Radigan was not prepared to offer witnesses in his own behalf. Similarly, without any notice as to the criminal nature of the October 26th hearing, Mr. Radigan was not alerted to the fact that his statements to the court could be used against him. Even a cursory examination of the opinion and order of November 2, 1983 reveals that the court below used Mr. Radigan's explanation as the basis for finding him in contempt of court.

By no stretch of the imagination did the proceedings of October 25, 1983 comply with the mandate of *Oliver*.

In actuality, Mr. Radigan, without prior notice or warning, was given eight (8) days from Monday, October 3, 1983, until Tuesday, October 11, 1983, to file appellant's brief. When petitioner believed he could not meet this deadline, he on October 11, 1983,

filed a motion for extension, not of thirty days, but of ten days in which to file the *Herald* brief.

In the instant case, Mr. Radigan's motion for an extension of ten days to and including October 21, 1983, although filed on the last day of the previously granted extension period, was timely. While it is true that the court below in its opinion and order as well as at the show cause hearing indicated its dislike for extension motions filed on the last day of the extension period, there is no procedural rule or decision which prohibits the filing of such a motion on the last available date. Consequently, the filing of such a motion is neither improper nor untimely.

In the ultimate analysis, the filing of a procedurally correct motion for extension, advancing colorable "good cause" in support of the requested relief, cannot be construed as improper conduct constituting contempt of an order of the court. Mr. Radigan's reliance on a procedural rule of appellate practice, a *timely* extension motion, to inform the court below that he could not comply with the October 11, 1983 deadline was legally and ethically proper and correct.

It should be noted that in the instant case on October 31, 1983, the court granted Mr. Radigan's motion for a ten-day extension and ordered the appellant's brief in the *Herald* case filed as of that date (Order, 10-31-83). Thus, five days after the show cause hearing and three days prior to the issuance of the opinion and order holding Mr. Radigan in contempt, the court below by order directed that the tendered appellant's brief in *Herald* be filed. The Kentucky Supreme Court

was well aware of Mr. Radigan's "substantial compliance" with its order of October 3, 1983 when that court found him in contempt of court.

Since the uncontroverted evidence before the court below establishes both "substantial compliance" and a "good faith" effort to comply with the order of October 3, 1983, it was a denial of due process under the federal constitution to find Mr. Radigan in contempt.

According to the court below, the brief filed in the Joseph Herald case "is a brief that should have taken ten days to prepare". *Id.*, at 674. In the words of the court, "ten days . . . [was] the appropriate time [for preparing the brief] in the first place". *Id.*, at 674. These statements are contained in a portion of the opinion which is designated as factual findings.

Since by the court's own findings, Mr. Radigan needed at the minimum ten days to prepare the appellant's brief in the *Herald* case, it was physically impossible for him to comply with the order of October 3, 1983 which gave him only *eight days* to complete that brief and file it by October 11, 1983. Under any reading of the opinion and order, Mr. Radigan would still have breached the October 11, 1983 deadline by requesting a two-day extension of time to file the brief in question.

"In a civil contempt proceeding . . . , of course, a defendant may assert a *present* inability to comply with the order in question." *United States* v. *Rylander*, 103 S. Ct. 1548, 1552 (1983); emphasis in original. "While the court is bound by the enforcement order,

it will not be blind to evidence that compliance is now factually impossible." *Id.* "Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." *Id.*, "It is settled, however, that in raising this defense, the defendant has the burden of production." *Id. See Hardin* v. *Summitt,* Ky., 627 S. W. 2d 580, 582 (1982).

Mr. Radigan raised his present inability to comply for the court's consideration when he filed a timely motion for a ten-day extension to and including October 21, 1983.

"Ordinarily, one charged with contempt of court for failure to comply with an order makes a complete defense by proving that he is unable to comply." *United States* v. *Bryan,* 339 U. S. 323, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950).

Mr. Radigan's inability to comply with the deadline of October 11, 1983 was explained in both his ten-day extension request and in his testimony at the show cause hearing. In his motion filed October 11, 1983, Mr. Radigan explained that during the last thirty days he had "completed a brief which is scheduled to be filed with the Court of Appeals of Kentucky on Wednesday, October 13, 1983" (Motion for Extension (10-11-83), p. 1). At the show cause hearing, Mr. Radigan explained that during the eight days between October 3-11, 1983, he had elected to complete and file the appellant's brief in the Kentucky Court of Appeals. Parenthetically, it should be noted that this was the case of *Greene* v. *Commonwealth,* File No. 83-CA-1340-MR (Radigan's Affidavit, (11-14-83), p. 2).

At the show cause hearing, members of the court expressed displeasure that Mr. Radigan completed the Court of Appeals brief and requested a ten-day extension in the *Herald* case despite the existence of the show cause order.

Mr. Radigan was faced with an ethical and pragmatic dilemma. Based on the work he had already completed on the *Greene* appeal and the number of extensions already granted by the Court of Appeals in that case, Mr. Radigan estimated in his professional judgment that if he continued to work on that appeal he could file it within the extension period. On the other hand, were he to abandon the *Greene* appeal temporarily to work on the *Herald* appeal, he quite possibly would fail to complete *Herald* by October 11, 1983 and also, by choice, fail to complete the *Greene* appeal. As a result both Greene and Herald could face dismissal of their appeals with lengthy delays during collateral actions to restore those appeals. Additionally, Mr. Radigan could face censure to *two* appellate courts for his handling of these two appeals.

Under these circumstances, Mr. Radigan's election to complete the *Greene* brief so it could be timely filed and to request an extension of only ten more days in *Herald* was not a contemptuous disregard of the order, but rather a considered professional judgment under difficult circumstances.

This Court has recognized that "criminal contempt is a crime in every fundamental respect." *Bloom* v. *State of Illinois,* 391 U. S. 194, 88 S. Ct. 1477, 1482, 20 L. Ed. 2d 522 (1968). "[C]onvictions for criminal

contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Id.*, 88 S. Ct. at 1482.

The Kentucky court made *no finding* that the evidence of record established, beyond a reasonable doubt, that Mr. Radigan "wilfully desregarded or disobeyed" its order to complete the appellant's brief in *Herald* within eight days—on or before November 11, 1983.

"Significantly inadequate responses," "no acceptable excuses, and "grossly inadequate explanations" by Mr. Radigan at the snow cause hearing do not translate into "wilfull desregard or disobedience" of the court's order, particularly where Mr. Radigan filed a timely motion for a ten-day extension and then tendered the completed brief before the expiration of that ten-day period.

Mr. Radigan's "behavior may have been, to some degree, irritating to the court," but "his conduct" did not rise "the the level of wilful obstruction of the orderly administration of justice or flagrant disrespect for the court so as to sustain a conviction for criminal contempt." *Matter of Schwartz,* D.C., 391 A. 2d 278, 282 (1978).

In any event, there was no evidence before the court below to counter any of Mr. Radigan's assertions both in his motions for extension and at the show cause hearings regarding his workload or his professional judgments in these matters. The record at bar contains no relevant evidence as to the crucial element of criminal contempt, that is, "a wilfull disregard or disobedience" of the court's order.

On the basis of the evidence of record, no rational trier of fact could find beyond a reasonable doubt that Mr. Radigan's conduct in the instant case was wilfull disregard or disobedience of the court's order. *Harris* v. *United States,* 404 U. S. 1232, 92 S. Ct. 10, 12, 30 L. Ed. 2d 25 (1971); *see Vachon* v. *New Hampshire,* 414 U. S. 478, 94 S. Ct. 664, 665, 38 L. Ed. 2d 666 (1974). *Jackson* v. *Virginia,* 443 U. S. 307, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

A person tried for contempt of court has a right to an impartial judge, one who is not so involved in the controversy that he would be "unlikely to maintain that calm detachment necessary for fair adjudication." *Taylor* v. *Hayes,* 418 U. S. 488, 94 S. Ct. 2697, 2704, 41 L. Ed. 2d 897 (1974).

In fact, "it is generally wise" for a judge "to ask a fellow judge to take his place" in presiding over a contempt proceeding. *Mayberry* v. *Pennsylvania,* 400 U. S. 455, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971).

The failure of the Kentucky Supreme Court to recuse itself from Mr. Radigan's contempt proceedings violated his federal constitutional right to a fair trial.

In its opinion and order, the Court below determined that William M. Radigan was in contempt of court and imposed a fine of $100. However, "[i]n consideration of this being the first conviction, payment of the fine is suspended subject to further conduct". *Id.,* at 674. There was no mention of either the length of the suspension, or the terms and conditions of the suspension.

"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida,* 430 U. S. 349, 97 S. Ct. 1197, 1205, 51 L. Ed. 2d 393 (1977). Yet, in the case at bar, Mr. Radigan faces an indefinite suspension of the fine without any specified conditions. These vague and ambiguous conditions violate federal due process at the sentencing stage.

These conflicts justify the grant of certiorari to review the judgment below.

II. The Decision Below Holding the Petitioner, An Appellate Public Defender, In Contempt of Court for Failure to File a Client's Brief by a Certain Date, Even After He Had By Timely Motion Requested an Extension to File the Brief Within the Requested Period, Raises a Federal Constitutional Question of Importance to the Administration of Criminal Justice.

"A court must exercise '[t]he least possible power adequate to the end proposed'." *Shillitani* v. *United States,* 384 U. S. 364, 86 S. Ct. 1531, 1536, 16 L. Ed. 2d 622 (1966).

"This doctrine . . . requires that the trial judge first consider the feasibility of coercing testimony [for example,] through the imposition of civil contempt." *Id.,* 86 S. Ct. at 1536 n. 9. "The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Id.*

The doctrine of the exercise of the least judicial power to the end proposed has equal application to original actions, such as contempt proceedings, by an appellate court.

In holding Mr. Radigan in contempt of court for failure to file the *Herald* brief on October 11, 1983, the Supreme Court of Kentucky sent a very definite message to the members of the Bar—even though the court below will not dismiss a criminal appeal, if the attorneys do not comply with the orders of the court to file the brief on a certain date, then the attorneys will be penalized by contempt proceedings. Such a result is contrary to the purpose of a contempt action and casts a chilling effect on effective representation by appellate attorneys.

"The power to punish contemptuous conduct is essential to the preservation of the dignity and authority of [this nation's] courts." *In Re Masinter,* La., 355 So. 2d 1288, 1290 (1978). "This power, however, must be used with great care so as not to obstruct the advancement of causes before the court." *Id.,* at 1291.

Appellate courts should "hesitate to take disciplinary actions" unless obviously warranted because the courts must remain "sensitive to even the slightest possibility of casting an inhibitory shadow upon the ardor of those who practice before" them. *In Re Bithoney,* 486 F. 2d 319, 323 (1st Cir. 1973).

Courts should use the ability to punish through contempt sparingly. "This is particularly true in contempt case against lawyers, where there must be limited interference with their right to properly represent their clients." *Matter of Schwartz,* D.C., 391 A. 2d 278, 281 (1978).

"In contempt cases against lawyers the evidence must be carefully scrutinized in order to insure that there is no undue interference with the attorney-client relationship." *In Re Marshall,* 423 F. 2d 1130 (5th Cir. 1970), citing *United States* v. *Schiffer,* 351 F. 2d 91, 94 (6th Cir. 1965). *See People* v. *Kurz,* 35 Mich. App. 643, 192 N. W. 2d 594, 598 (1972).

The facts of the case at bar reflect the possibility of such a chilling effect on zealous advocacy. At the October 26, 1983 hearing, Mr. Radigan explained to the court below that from October 3 until October 11 he was working on the appellant's brief in the case of *Greene* v. *Commonwealth* which was pending before the Court of Appeals on a "final extension." If Mr. Radigan had stopped working on the *Greene* case in an attempt to prepare the pleadings in *Herald,* he felt that he was in danger of having *Greene* dismissed. However, the court below at the October 26th hearing severely citicized Mr. Radigan's professional and good faith judgment of priorities. In effect, the court told Mr. Radigan that he should have placed the *Greene* case in possible jeopardy and made a possibly futile attempt to complete *Herald.* In other words, Mr. Radigan should have sacrificed *Greene* for *Herald.*

In *In re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 424 (1962), this Court held that while it is necessary that a judge have the power to protect himself from actual obstruction in the courtroom, "it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases."

Appellate counsel, whether retained or appointed, should not fear that requests for extensions to insure a complete and adequate appellate presentation will be translated into retaliatory contempt sanctions against them.

This important constitutional question in the administration of criminal justice justifies the grant of certiorari to review the decision below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the Supreme Court of Kentucky entered on November 2, 1983.

Respectfully submitted,

J. Vincent Aprile II by cmb

J. VINCENT APRILE II
Attorney at Law
2520 Meadow Road
Louisville, Kentucky 40205
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, J. Vincent Aprile II, counsel for petitioner, hereby certify that forty (40) copies of the foregoing Petition for Writ of Certiorari was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and three (3) copies to John Scott, Clerk, Kentucky Supreme Court, Capitol Building, Frankfort, Kentucky 40601, and three (3) copies to Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601, this 21st day of March, 1984, by personally depositing same in a United States mail box, first-class postage prepaid. I further certify that all parties required to be served have been served.

J. Vincent Aprile II by cmr

J. Vincent Aprile
Attorney at Law
2520 Meadow Road
Louisville, Kentucky 40205
Counsel for Petitioner

APPENDIX

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER

Appellant's motion for an extension of time is granted. Appellant shall file his brief and perfect the appeal in the above-styled action on or before October 11, 1983.

If appellant's brief is not filed on or before October 11, 1983, counsel for the appellant shall appear before this court on October 24, 1983, at 10:30 a.m., in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief.

Stephenson, Vance, Wintersheimer and Aker, JJ., sitting. All concur.

ENTERED October 3, 1983.

(s) Robert F. Stephens
Chief Justice

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

83-SC-866-I

IN RE: WILLIAM M. RADIGAN, *Attorney*

OPINION and ORDER—Entered November 2, 1983

On October 3, 1983, by Order of the Supreme Court of Kentucky, in case #83-SC-552-I, styled *Joseph Herald* v. *Commonwealth of Kentucky*, this Court granted appellant's motion for an extension of time to October 11, 1983, to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed on or before October 11, 1983, counsel for the appellant shall appear before this court . . . in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief."

Appellant's counsel, William M. Radigan, failed to comply with this Order, and a hearing was held on October 26, 1983, at which time Mr. Radigan appeared and offered explanation.

We find the following facts to be true:

The transcript of evidence was filed on June 10, 1983. Thereafter on three occasions on or about the day the brief was due the appellant failed to file but instead filed an affidavit, notice and motion for another thirty days extension. In each case the allegations of Mr. Radigan's affidavits are markedly similar. In each case in paragraph 5 they recite that "This motion is made in good faith and not for the rea-

son of delay." But for the most part the six paragraphs of allegations in each affidavit parrot the preceding affidavit chapter and verse except for small differences in the first paragraph. In sum they indicate counsel is reasonably busy, and nothing further.

The practice prevalent in criminal cases of counsel routinely seeking multiple extensions has become a serious problem which this Court must consider in discharge of its administrative responsibilities.

At the oral hearing conducted October 26, 1983, Mr. Radigan advised this Court that he looked at the record in this case for the first time on the last day of the third extension. In spite of a pending show cause order he intentionally chose to work on other matters.

At that point Mr. Radigan determined that the record could be read and the necessary briefing accomplished in ten days. Once more he moved this Court on the last day for filing his statement of appeal and brief, for yet another extension—this time for ten days, the appropriate time in the first place.

Mr. Radigan is an experienced attorney with the Office of Public Advocacy. As such he is aware that should this Court refuse to permit such extension of time, however unreasonable, and dismiss appeals for failure to timely file statement of appeal and brief, thus effectively barring his client's appeal through his own misconduct, the person thus deprived of an appeal could seek further remedy in Federal Court in habeas corpus proceedings.

As the Court charged with responsibility for the orderly administration of justice in this state we cannot tolerate counsel deciding when it is timely and appropriate for a brief to be filed, assuming power to act with impunity because of the problems in the administration of criminal justice that would otherwise result from a dismissal of the appeal.

When Mr. Radigan appeared in response to the Order of this Court to show cause, his response was significantly inadequate. The brief which he has filed in the Joseph Herald case shows that it is a relatively simple case with few issues, all of a routine nature. As he has admitted and demonstrated, it is a brief that should have taken ten days to prepare, filed 133 days after the transcript of evidence was filed.

We find no acceptable excuse for beginning work on this case on October 11, 1983. We further find that Mr. Radigan is in contempt of the Order of this Court entered October 3, 1983, requiring him to file his brief on or before October 11, 1983 or appear to show cause why he should not he held in contempt for failure to do so. We find his explanation as to other work and projects occupying his time during the period in question grossly inadequate. We find no explanation for failing to notify us immediately if there were considerations that would legitimately have prevented his complying with our Order of October 3 when notified thereof.

Being duly advised, it is the Order of this Court that said William Radigan is found in contempt of Court and fined $100 for his contempt.

In consideration of this being the first conviction, payment of the fine is suspended subject to further conduct.

Stephens, C.J., Gant, Leibson, Stephenson and Wintersheimer, JJ., concurring.

ENTERED November 2, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

83-SC-866-I

IN RE: WILLIAM M. RADIGAN, *Attorney*

ORDER—Entered November 17, 1983

The motion to vacate the opinion and order of this Court herein, entered November 2, 1983, and to rehear this matter, is denied.

Entire Court sitting.

All concur.

ENTERED November 17, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

83-SC-866-I

IN RE: WILLIAM M. RADIGAN, *Attorney*

In Supreme Court

ORDER DENYING MOTION TO RECONSIDER—
Entered December 22, 1983

William M. Radigan's motion to reconsider is denied.

All concur.

ENTERED December 22, 1983.

(s) Robert F. Stephens
Chief Justice

AFFIDAVIT OF WILLIAM M. RADIGAN

Comes now the affiant, William M. Radigan, and having been duly sworn, states as follows:

1. The affiant is the appointed appellate counsel in the case of *Herald* v. *Commonwealth,* File No. 83-SC-552-MR.

2. The affiant is additionally the named individual in the Opinion and Order entered by this Court in *In Re: William M. Radigan, Attorney,* File No. 83-SC-866-I.

3. From June 10, 1983, when the record of appeal in *Herald* was filed with this Court,[1] until October 31, 1983, when the *Herald* brief was ordered to be filed, the affiant, acting as assigned counsel, has filed a total of three hundred and five (305) pages of appellate pleadings. These include:

(1) June 17, 1983: *Meredith* v. *Commonwealth,* File No. 83-SC-122-MR (original brief, 4 issues, 29 pages);

(2) June 27, 1983: *Trent* v. *Commonwealth,* File No. 83-CA-470-MR (original brief, 1 issue, 19 pages);

(3) July 11, 1983: *Crick* v. *Smith,* United States Court of Appeals for the Sixth Circuit (original brief, 2 issues, 36 pages);

(4) July 25, 1983: *Conover* v. *Commonwealth,* File No. 83-CA-594-MR (original brief, 1 issue, 7 pages);

(5) August 3, 1983: *Moore* v. *Oldham,* File No. 83-CA-877-OA (Mandamus action, 8 pages);

(6) August 16, 1983: *Meredith* v. *Commonwealth,* File No. 83-SC-122-MR (Reply brief, 4 issues, 5 pages);

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[1]Even though the affiant was not assigned the *Herald* case until *July* 5, 1983, this Court in the Opinion and Order in *Radigan* calculated the time from June 10, 1983. The affiant will follow this Court's lead and review his caseload from that date.

(7) August 18, 1983: *Presley* v. *Rees,* United States District Court for the Eastern District of Kentucky (petition for writ of habeas corpus, 1 issue, 27 pages);

(8) August 19, 1983: *Harston* v. *Parke,* United States District Court for the Western District of Kentucky (petition for writ of habeas corpus, 2 issues, 44 pages);

(9) September 7, 1983: *Harris* v. *Commonwealth,* File No. 83-SC-409-MR (original brief, 3 issues, 32 pages);

(10) September 8, 1983: *Moore* v. *Oldham,* File No. 83-CA-1967-OA (mandamus action, 17 pages);

(11) September 28, 1983: *Crick* v. *Smith,* United States Court of Appeals for the Sixth Circuit (reply brief, 2 issues, 10 pages);

(12) October 13, 1983: *Greene* v. *Commonwealth,* File No. 83-CA-1340-MR (original brief, 4 issues, 29 pages);

(13) October 17, 1983: *Ringo* v. *Commonwealth* (discretionary review, 7 pages);

(14) October 21, 1983: *Herald* v. *Commonwealth,* File No. 83-SC-552-MR (original brief tendered, 3 issues, 25 pages);

(15) October 28, 1983: *Buchanan* v. *Commonwealth,* File No. 83-SC-257-MR (reply brief, 3 issues, 5 pages):

(16) October 31, 1983: *Harris* v. *Commonwealth,* File No. 83-SC-409-MR (reply brief, 3 issues, 5 pages).

4. From June 10, 1983, through October 31, 1983, the affiant has had five (5) oral arguments in the state and federal appellate courts. These include:

(1) June 30, 1983: *Lucey* v. *Seabolt,* United States Court of Appeals for the Sixth Circuit;

(2) July 5, 1983; *Wine* v. *Commonwealth,* Court of Appeals of Kentucky;

(3) September 15, 1983: *Riggsbee and Jackson* v. *Commonwealth,* Supreme Court of Kentucky;

(4) October 4, 1983: *Gay* v. *Commonwealth,* Court of Appeals of Kentucky;

(5) October 27, 1983: *Hibbard* v. *Commonwealth,* Supreme Court of Kentucky.

5. From June 10, 1983, through October 31, 1983, the affiant has been involved in the preparation of a retrial in the case of *Commonwealth* v. *Brian Keith Moore,* Jefferson Circuit Court, a death penalty case. During this period, the affiant has been involved in the following matters:

(1) June 15, 1983: investigation and trial preparation;

(2) June 17, 1983: investigation and trial preparation;

(3) June 20, 1983: motion hour;

(4) June 22, 1983: investigation and trial preparation;

(5) June 27, 1983: motion hour;

(6) June 30, 1983: investigation and trial preparation;

(7) July 5, 1983: investigation and trial preparation;

(8) July 11, 1983: motion hour;

(9) July 13, 1983: investigation and trial preparation;

(10) July 18, 1983: investigation and trial preparation;

(11) July 20, 1983: investigation and trial preparation;

(12) July 27, 1983: investigation and trial preparation;

(13) August 22, 1983: motion hour;

(14) August 23, 1983: investigation and trial preparation;

(15) August 24, 1983: investigation and trial preparation;

(16) August 25, 1983: investigation and trial preparation;

(17) August 26, 1983: evidentiary hearing;

(18) September 16, 1983: investigation and trial preparation;

(19) September 30, 1983: evidentiary hearing;

(20) October 21, 1983: investigation and trial preparation.

6. From June 10, 1983, through October 12, 1983, the affiant was actively involved as defense counsel in the case of *Commonwealth* v. *Everett Wayne Bishop*, a retrial of a robbery conviction in the Jefferson Circuit Court. During this period, the affiant was involved in the following matters:

(1) June 20, 1983: motion hour;

(2) July 13, 1983: investigation and trial preparation;

(3) July 20, 1983: investigation and trial preparation;

(4) July 25, 1983: motion hour;

(5) August 3, 1983: investigation and trial preparation;

(6) October 12, 1983: guilty plea to lesser-included offense for time served.

7. From June 10, 1983, through September 20, 1983, the affiant was actively involved as defense counsel in the case of *Commonwealth* v. *Calvin Ray Smith*, a retrial of a manslaughter conviction in the Clay Circuit Court. During this period, the affiant was involved in the following matters:

(1) August 22, 1983: investigation and trial preparation;

(2) September 13, 1983: deposition, investigation and trial preparation;

(3) September 15, 1983: trial preparation and preparation of motions;
(4) September 16, 1983: trial preparation and preparation of motions;
(5) September 19-20, 1983: motion hour, evidentiary hearing, continuance until January 25, 1984.

8. During October of 1983, the affiant has been actively involved as counsel for the plaintiffs in the case of *Turner, et al.* v. *Stumbo,* a civil rights action in the United States District Court for the Western District of Kentucky, on remand from the Sixth Circuit. The affiant has been involved in the following matters:

(1) October 6, 1983: investigation and preparation for hearing;
(2) October 11, 1983: investigation and preparation for hearing;
(3) October 18, 1983: investigation and preparation for hearing;
(4) October 21, 1983: investigation and preparation for hearing; preparation of pleadings;
(5) October 23, 1983: investigation and preparation for hearings;
(6) October 24, 1983: preparation of pleadings;
(7) October 25, 1983: hearing, case set for trial on merits on November 22-23, 1983.

(s) William M. Radigan
William M. Radigan, Affiant

Subscribed and sworn to before me by William M. Radigan this 14th day of November, 1983.

(s) Joyce L. Gayles
Notary Public State at Large

My Commission Expires: September 20, 1987

AFFIDAVIT OF MARK A. POSNANSKY

Comes the affiant, Mark A. Posnansky, and after first being duly sworn, states as follows:

That I am the Manager of the Appellate Branch of the Department of Public Advocacy in Frankfort, Kentucky, and, that as such, one of my responsibilities is to assign appeals to the attorneys in the Appellate Branch for briefing.

That I assigned the case to Joseph Herald, an appeal from the Campbell Circuit Court, to William M. Radigan. The Department of Public Advocacy was notified by the Kentucky Supreme Court that the record in said case had been received on June 10, 1983. The Brief For Appellant, therefore, was due to be filed on July 10, 1983.

That the appeal was not assigned to William M. Radigan until July 5, 1983. The reasons that the assignment was not made until that date are as follows:

1. For several years the Department of Public Advocacy has been assigning some of its cases outside of the central office under the "of counsel" plan. This is due to the fact that the staff in the central office is not large enough to absorb all of the appeals coming into the office. A conscious and deliberate decision was made, at the time these appeals started being assigned outside of the office, to assign only cases with a sentence of under ten (10) years. The reason for this decision was the belief that the experience and expertise of the central office attorneys dictated that they should handle the more serious criminal cases.

2. Due to the increasing number of appeals coming into the office, and due to the fact that the size of the central office has remained stationary by order of the Executive Branch of the Commonwealth of Kentucky, it has become necessary to assign some cases outside of the office where

the sentence is greater than ten (10) years. But the policy has always remained that, if at all possible, sentences of twenty (20) years or over should remain in the central office. As Manager of this Branch, I have tried to adhere to this policy.

3. The attorneys in the Appellate Branch of the Department of Public Advocacy are currently carrying a caseload of twenty-four (24) appeals per year. That is the maximum allowable amount under the National Legal Aid and Defended Association Standards. In order to equitably assign these twenty-four (24) appeals per year, the affiant assigns them at the rate of two (2) cases per month to each attorney.

4. The Court should be aware that the number of new appeals coming into the central office is increasing at a record pace. During fiscal year 1983 (July 1, 1982 - June 30, 1983), the Department of Public Advocacy received an average of 43.7 new appeals per month. The figure for the previous fiscal year was an average of approximately 29 new appeals per month.

5. During this same period of time, the number of attorneys in the Appellate Branch of the central office has not only failed to increase, it has decreased by one (1). That attorney, Neal Walker, resigned in March, 1983. Due to the hiring freeze which has continuously been in effect in state government, the Department has not been able to fill this position. This has resulted in an even greater burden on the attorneys in the central office.

6. The Joseph Herald case was assigned to Mr. Radigan on July 5, 1983. The record had been received by the Supreme Court on June 10, 1983. But because the number of appeals to be assigned at that time was so large, all of the June assignments were made to attorneys in the central office *on June 1, 1983.* On that date, affiant depleted his

entire month's assignments. Affiant was therefore not in a position to assign the Herald case when it came in.

7. Because the Joseph Herald appeal was an appeal to the Kentucky Supreme Court, and because of this office's policy of assigning Supreme Court cases to "in-house" attorneys, it was necessary to hold the Herald case until July. Affiant assigned the Joseph Herald appeal to William M. Radigan on July 5, 1983. That was the first working day for attorneys in the central office during the month of July.

8. Affiant can state to this Court with certainty that the assignment would have been made much earlier had there been anyone in the central office to assign the case to. But since the policy of this office is to assign two (2) cases per month, and since the policy of this office is to assign Supreme Court cases to "in-house" attorneys, and since the June assignments had been exhausted by June 1, affiant had no choice but to wait until July 5 to make this assignment.

Further affiant saith not.

(s) Mark A. Posnansky
Mark A. Posnansky
Assistant Public Advocate
Appellate Branch Manager

Subscribed and sworn to before me by Mark A. Posnansky on this 14th day of November, 1983.

My Commission Expires: August 31, 1986

(s) Kathy D. Collins
Notary Public - State at Large